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DISCOURSE ¹⁵

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Mr. John Cuninghame
ADVOCATE,

At the Beginning of his

LESSONS

UPON THE

SCOTS LAW.

EDINBURGH,

Printed by James Watson, and to be Sold by Mr. Robert
Freebairn, Bookseller in the Parliament-Cloſe. 1705.

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M. John Cunningham

ADVOCATE

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Bell, Bookseller in the Parliament Chamber, 1793.

GENTLEMEN,

BEFORE I begin my Lessons upon the *Scots Law*, I thought it proper to let you know in few words, of what Parts the *Municipal Law* of this Kingdom is made up, and to give you a general view of the Method I design to follow, in Explaining it.

OUR *Scots Law* is compounded of our *Statutes* and of our *Customs*; or, which is much the same thing, our Law may be divided into *Statutory* and *Consuetudinary*. Under our *Statutes* may be comprehended, not only our Acts of *Parliament*, but also the Acts of *Sederunt* made by the Lords of Session, who after the Institution of the College of Justice by King *James V.* were impowered to make such Acts and Statutes, as they should think expedient for the order of Procedure before them, and for the speedy dispatch of Business.

UNDER our *Customs*, I comprehend all that which is received for Law amongst us, which was neither enacted, nor afterwards ratified by those who have the Legislative Power; such as the Things contained in the Books commonly called *Regiam Majestatem*, which being only collected by a private Hand, and never publicly Authorised, cannot be reckoned a part of our Statutory Law: Yet they are a Collection of Customs which obtained amongst us; and where they are not contrary to our Statutes, nor abrogat by our posterior Customs, they ought to have considerable weight with our Judges, especially seeing in several Acts of Parliament they are reckoned amongst the Books of our Law.

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THE *Decisions* of the Lords of Session, which have been universally received, or at least generally acquiesced in for a considerable time, are likewise a part of our *Consuetudinary* Law, so as to have force against all Persons in all such Cases, and in so far to be equivalent to a Statute; for the tacite Consent of the Society is inferred from such a general Acquiescence: And since no Statute can be made, that can comprehend all Cases which may occur, the Good which arises to the Society from the having fixed and certain Rules for determining Property requires, That not only what is expressly *Statute*, but also what is tacitly agreed to, should oblige every Member of the Society, and have the force of a Law.

THE *Civil*, *Feudal*, and *Canon* Laws, cannot be said to make a part of our Law, but in as far as they are adopted into it by our *Statutes* or *Customs*; yet the *Civil* and *Feudal* Laws are so much the Fountain from which our Law derives most of its Principles, that no Man can thoroughly understand the *Scots* Law, unless he has made some progress in them; for the matter of Obligations, and the ways of extinguishing them; the matter of Contracts, Crimes, Minors, Restitution *in integrum*, Tutors and Curators, Servitudes, Testaments, Actions, and much of our Forms of Process, are derived from the Principles of the *Civil* Law: Yea, all our Rules, and all the Reasonings from our Statutes, are borrowed from the *Civil* Law, as the true Fountain of Equity, which upon this account is of universal Use and Authority: So that its Principles diffuse themselves through the Municipal Laws of all the Countries in *Europe*. Upon the other hand, the difference betwixt Heritage and Conquest; the different Rules of Succession in Immovable and Moveable Things; the Constitution and Transmission of Heritable Rights by *Charter* and *Sasine*; the Casualties of

of the Superiority ; the Right which arises to the Superior and to the Vassal, and the ways of extinguishing their Rights ; the Cognoscing of Causes both Civil and Criminal by Assises, and several other things else in our Law, are at first derived, and have their beginning from the *Feudal* Law. The *Canon* Law is also received into some parts of ours ; For the Matter of Marriage and Divorce, of Scandal, of the Administration of the Goods of Pupils and Orphans, from whence came the Confirmation of Defuncts latter-Wills, do by our Law properly belong to the *Commissars*, who by their first Institution were Ecclesiastical Judges, being the Bishops Delegates, and who as yet are the proper Judges in all these Matters which were long ago exempted from the Secular Jurisdiction, and made Ecclesiastical Causes : And therefore where our own Law does not determine them, they may be judged according to the Ecclesiastical or Canon Law. As for what concerns Ecclesiastical Persons and Tiends, the *Canon* Law cannot be so much a Rule to us as in the fore-mentioned things, since the Hierarchy of the Church and the Revenues of Church-Men have been changed by us, and a Civil Court appointed for ordering the matter of our Tiends ; yet still even in these Matters the *Canon* Law may serve for a History, by which we may know their original Institution, and deduce them from the Fountain.

It remains now, that I give you some account of the Method which I intend to follow in explaining our *Scots* Law. I have made choice of Sir George Mackenzie's *INSTITUTIONS* for my Text ; it is a Book which very succinctly and methodically delivers the Principles of our Law, and comprehends all the most material things to be known in it : So that, as Sir George himself writes in his Preface, *If any Man understand fully this little Book, natural Reason and Thinking will easily supply much of what is diffused through our*
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many Volumes of Treatises and Decisions. There are indeed since the writing of this Book some Alterations in our Law, which make a little change in the body of its Principles; but as they are not very many, so they shall be taken notice of as they occur, and the Reasons of our new Law shall be briefly touched.

I propose in explaining this Book, to illustrate briefly the most remarkable Acts of Parliament upon which any of its Principles are founded; and where the Principles are derived from the *Civil* or *Feudal* Laws, I shall as distinctly as I can deduce them from the Fountain, and in few words remark the differences betwixt these Laws and Ours: I shall also frequently adduce our *Decisions*, for confirming and further clearing of these Principles, which Sir George collects out of them, and delivers to us as established and untraverted *Maxims*. I persuade my self that this Method, if rightly pursued, will both satisfy and instruct my Hearers, and lay a solid Foundation for an easie and successful attaining to the knowledge of the *Scots* Law.

But, *Gentlemen*, you are not to expect to hear from me any new Discoveries, or Things out of the common reach: For as I do not pretend to any uncommon knowledge of our Law; so I intend to content my self with delivering what is most plain and obvious, and of most use, since I resolve to make it my principal Business to instruct you in the most solid and useful Things of our Law, and not to amuse you with Speculations about Cases which rarely occur. I hope tho' my Performances may come short of your Expectations, that you will give a just allowance to my want of Experience in Teaching, and believe that from a mean and low Appearance at first, I may be capable to arrive to a greater perfection, and become daily more fit to acquit my self to the satisfaction of my Hearers.

To

To conclude my Discourse, I shall only add, That, as all Things ought to be Begun, Continued, and Ended in GOD; so I heartily pray, that He may direct our Studies to serve the Great Ends of His infinite Wisdom: And may Almighty GOD, Whose Nature is the Eternal Rule of Justice and Right, teach us His Laws, and incline our Hearts to obey Them, and cause us to know and fulfil the Duties we owe to GOD, to our Selves, and Neighbour; and then we shall more easily attain to the knowledge of Human Laws, when we have our Minds seasoned with the Principles of Natural Equity, the only true Foundation upon which all Human Laws are built.

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